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Issue Date: 01 February 2006

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In the Matter of

ANTHONY CHANG
Claimant

Case No. 2005 LHC 01228
OWCP No. 6-188924

v.
APM TERMINALS, INC./
SIGNAL MUTUAL INDEMNITY
ASSN., LTD.
Employer/Carrier
And
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest
……..

Decision and Order

This matter arises pursuant to a claim for benefits filed under the Longshore Act by Anthony Chang of Jacksonville, Florida. On July 12, 2002, Chang injured his head, neck, back, and right knee when a crane dropped a 40-foot container onto the chassis of a yard hustler he was operating. As a result of the injuries, Claimant sustained a disc protrusion at L4/L5 and an annular tear at L5/S1 which were treated surgically on September 17, 2003. Tr. 32-33. The parties have stipulated that Claimant's average weekly wage is $1,017.30. Tr. 34.

Background

On March 1, 2004, Claimant was released to return to work with restrictions against lifting more than 35 pounds and bending more than five times per hour, Tr. 34, 53, and he attempted to return to work at that time. Tr. 53. The business agent of ILA, Local 1408 discouraged him away from shaping up, however, and issued Chang a letter advising that there is no light duty work on the docks. Tr. 53-54, Tr. 79. *See also,* EX 6; CX 8 (Local 1408 letter to Dr. Hudson). Thereafter, on March

3, 2004, Claimant's physician placed him on a no-work status due to a flare-up of back pain Chang experienced when he lifted firewood at home. Tr. 34-35, 54, 77.

After a period of recovery from the flare-up, Dr. Calvin Hudson, on May 26, 2004, released Claimant to return to work; four hours a day for two weeks, then six hours a day for the next two weeks, and then 8 hours per day with his original restrictions. Tr. 38, 55. Claimant returned to the docks and tried to secure jobs as a waterman, van driver, and header, but these positions were "unavailable" to him. Tr. 55-56. In June, 2004, Chang also contacted businesses listed on a labor market survey conducted by the Employer and job searched on his own without success. Tr. 56-57. In late July or early August, 2004, under considerable financial pressure, Claimant decided he wanted to return to longshore work. He approached the vice president of Local 1408, insisting that he had a right to work, and testified that he "bullied [his] way back in a sense." Tr. 58, 62-64. Chang testified that the Local deemed him unfit to shape up and advised that he would be breaking the rules and could be suspended if he returned to work. 61-65. Nevertheless, Chang testified he returned to work on August 8, 2004, and secured jobs as an auto driver. Tr. 58. No one at Local 1408 tried to stop him from shaping up that time. Tr. 65. He thus returned to work at that time, and he was employed as a longshorman at the time of the hearing.

As a longshoreman, Claimant receives vacation and holiday pay if he works 700 or more hours from October 1 to September 30 year to year and he receives container royalties after 1000 hours. Tr. 69, 72. His highest rate of pay is $28.00 per hour. Tr. 69. Between March 1, 2004, and August 8, 2004, nothing changed in terms of his restrictions. Tr. 71. Claimant's experience has been that once he has shaped up for a job, he has not been reassigned to a different job. Tr. 74. Despite the letter issued by Local 1408 indicating that he had to be 100% physically fit, Claimant was not 100% physically fit when he actually went back to work. Tr. 75.

Issues

Although Claimant returned to work, he continued to receive disability benefits from March 1, 2004 through April of 2005, and now agrees with Employer that he received an overpayment of compensation. He contends, however, that Employer improperly terminated his disability payments rather than recouping its overpayment through partial 20% reductions in his benefits. Tr. 36-37.

In this proceeding, Claimant seeks temporary total disability from March 1, 2004 until he returned to work on August 8, 2004, Tr. 70, and permanent partial disability compensation based upon a loss of wage earning capacity thereafter. Tr. 38-40, 44; Tr. 146-48. Claimant contends that his earnings on the docks now, when reduced back to 2002 levels, are less than his pre-injury earnings. Tr. 148. Employer responds that he has suffered no loss of wage earning capacity during this period and argues that an overpayment exists back to March 1, 2004 and thereafter in the amount of $38,936.95; $13,565.35 attributable to the period March 1, 2004, to August 7, 2004, Emp. Br. at 8, and $25,371.60 attributable to the period August 8, 2004, through April 17, 2005. Tr. 86; Emp. Br. at 9; *but see*, Tr. 87, 94, Ex 10. (estimated annualized earnings by carrier amounting to $46,667). The carrier agreed, however, that Claimant's post-injury wage earning capacity must, in any event, be reduced to its 2002 equivalent. Tr. 94-95. In addition, to recovery of the overpayment, Employer petitions for relief under Section 8(f) of the Act.

Medical Evidence

Following his July 12, 2002 injury, Chang was treated conservatively with therapy and medication by Dr. Fady El-Bahri. His radiating pain did not resolve, however, and Dr. El-Bahri referred him to Dr. Calvin Hudson. Cx 6.

Dr. Hudson was deposed post-hearing and his deposition dated July 26, 2005, is hereby admitted into evidence. Dr. Hudson is a neurosurgeon. Dep at 4. He first saw Chang, who was complaining of low back and bilateral thigh pain, on July 3, 2003. CX 9; Dep. at 6. Dr. Hudson reviewed Claimant's medical history which included a 2000 MRI showing a disc protrusion at L4/L5 with no effect on the thecal sac. Dep. at 10. In addition, he reviewed Claimant's work and symptom history, performed a physical examination, and reviewed more recent MRI results which revealed a ruptured disc at L4/L5 with significant pressure on the thecal sac. Dep. at 9-10. Dr. Hudson diagnosed a central ruptured disc at L4/L5 with radiculopathy. Dep. at 11. His treatment included surgery on September 17, 2003, involving a laminectomy. Dep. at 12-13. Following a period of recovery and rehabilitation, he released Claimant to return to work as of March 1, 2004, with permanent limitations against lifting over 35 pounds or bending more than five times per hour. CX 9; Dep. at 18.

On March 3, 2004, Chang returned to Dr. Hudson complaining of back pain caused by lifting firewood at home. CX 9; Dep. at 19. Dr. Hudson diagnosed Claimant's condition as a flare-up of his disc problem. He testified that the resulting pain was a temporary aggravation of his job-related disc condition. Dep.

at 20-22, 26-27. The lifting incident did not cause new neurological problems, Dep. at 45-45, but Dr. Hudson advised Claimant that he should not try to return to work until his condition improved. Dep. at 20; *see also* letter dated March 10, 2004. With respect to the firewood incident, Dr. Hudson testified that if Claimant lifted more than 35 pounds of wood at a time or bent more than five times per hour to lift the wood, he exceeded his restrictions, Dep. at 33, and had he not lifted the wood he would have slowly improved after March 1. Dep. at 35-36.

On May 26, 2004, Dr. Hudson released Claimant to work part-time, incrementally, four hours per day for the two week period beginning May 26, 2004, six hours per day for the next two weeks, and beginning June 23rd, he was released to work full time, eight hours per day, with the permanent restrictions he had imposed, including no lifting over 35 pounds and no bending more than five times per hour. CX 9; Dep. at 23-25, 43. On June 29, 2004, he told Chang he had reached MMI as of that date. Dep at 25-26. Dr. Hudson approved several jobs that he deemed suitable for Claimant, but later clarified at his deposition that for the jobs he approved to be appropriate, the employer had to honor the modifications he imposed. Ex 13; Dep at 27. His restrictions, he testified, did not include occasional bending up to 2.6 hours per day, Dep at 28, and the job must allow Claimant to sit and stand to relieve pain. Dep at 30.

Following his release by Dr. Hudson, Claimant continued to see Dr. S. Scott Kramarich for treatment of his pain. Dr. Kramarich's records show that he treated Claimant consistently from December 17, 2003, at least through April of 2005. Cx 10; Ex 4.

Suitable Alternate Employment
(Longshore Jobs)

Employer called Rick Robinson to testify at the hearing. Tr. 112. Robinson is a vocational specialist, and he conducted labor market surveys which identified both longshore and non-longshore jobs that he deemed suitable for Claimant considering his age, education, work history and physical limitations. Tr. 115. Many of the jobs Robinson identified were initially approved by Dr. Hudson. Ex 13; Tr. 115. The ILA jobs required occasional bending, Tr. 138, but were approved by Dr. Hudson with modifications. Tr. 125. The approved longshore jobs included van driver, auto flagman, and hustler driver, Tr. 114-115, although Dr. Hudson later questioned whether the hustler driver job would allow Claimant to sit and stand periodically. *See*, Hudson, Dep. at 30. Two different van driver jobs and two different flagman jobs were sent to Dr. Hudson. Reviewing these jobs, Dr.

Hudson approved one van driver and one flagman job, and, in each case, he disapproved the other very similar job, Tr. 125-26; and the record does not reflect his rationale for approving and disapproving the similar jobs. Tr. 126.

Robinson testified that the union jobs are subject to union rules and by-laws, Tr. 121, and their availability, to a significant degree, is governed by seniority. Tr. 121. Given his seniority, Chang probably could not regularly secure the van driver or flagman positions. Tr. 122. Robinson did not, however, consider Claimant's seniority in assessing job availability on the docks. Tr. 123.

Although Local 1408's has articulated a policy indicating that workers must be 100% physically fit to shape up, Chang has been allowed to work with restrictions since returning to the docks. Tr. 138, 140. The longshore jobs ranged in pay from $25.00 to $28.00 per hour.

Non-Longshore Jobs

Robinson also conducted labor market surveys to identify non-longshore positions that were suitable for Claimant. These included, among others, senior clerk at Healthcare, Inc., technician trainee at Harmony Dental Lab, packer at Pilot Pen, greeter at Wal-Mart, cashier and greeter at Wal-Mart, and Quest Diagnostic and market surveyor at Quick Test, Tr. 115-116.

As noted above, for the period March 1, 2004, through May 26, 2004, Dr. Hudson had placed Chang on no work status, and Robinson agreed that vocationally he could not work. Tr. 123-24. Thereafter, again as discussed above, Dr. Hudson released Claimant to work part time for the next four weeks, and released him to work full time beginning June 23rd, with the permanent restrictions he had imposed, including no lifting over 35 pounds and no bending more than five times per hour. Tr. 124-25.

The only jobs Robinson identified that accommodated Claimant's temporary part-time restriction were the two positions at Wal-Mart, and Robinson thought both were available as of May 26, 2004. Ex 13; Tr. 127-128. He followed-up with Wal-Mart and was told Chang had not applied for one of the jobs with Wal-Mart, but he was unable to confirm whether, as Chang testified, that he applied for the other Wal-Mart job. Tr. 128.

Dr. Hudson released Claimant for full time work beginning June 23, 2004, with his permanent bending and lifting limitations, and Robinson identified several full time opportunities that Dr. Hudson initially approved. Ex 13.

The record shows that the full time jobs at Healthcare, Pilot Pen, Wal-Mart cashier, Harmony Dental Lab, Quest Diagnostic, and others required occasional bending, Tr. 135-36; Ex 13, and Robinson clarified that "occasional" bending means up to 33% of the day or 2.7 hours. Tr. 129. He explained that if an employer will not specify how much bending a job requires, he uses the phrase "as needed" to describe the job's bending requirements. Tr. 130-31. "As needed" refers to an action that may be incidental to the job but could be more than five times per hour. Tr. 132. Robinson did not determine whether the employers that had jobs with occasional bending requirements would accept Dr. Hudson's bending modification. Accordingly, jobs which were initially approved by Dr. Hudson, but required "occasional" bending were later disapproved once Dr. Hudson understood the vocational meaning of "occasional" bending. Hudson Dep. at 28.

Firms that offered jobs with bending "as needed" or "never," included Irwin Research, The Spaghetti House, Caruso Jeep, and Quick Test market surveyor which paid $6.00 per hour and was available on July 30, 2004. Ex 13. Robinson believes, however, some of the jobs were probably available as of March 1, 2004, Tr. 116-117; Tr. 144-45; but identified no specific non-longshore job which was available before May 26, 2004, Tr. 143; and except for the longshore jobs Claimant performs now, but were unavailable to him before August 8, 2004, the Quick Test job, paying $6.00 per hour, is the earliest job that met Claimant's bending restriction as modified by Dr. Hudson. Depo at 28; Ex 13.

Robinson determined that Claimant's wage earning capacity, taking all non-longshore jobs into consideration, is approximately ten dollars per hour or $400.00 per week. Tr. 119. The $10.00 per hour was based on Quest Diagnostic Job, available on July 23, 2004. Tr. 143. Wal-Mart cashier job was $7.00.00 per hour. Tr. 143. For the ILA jobs, the hourly rate ranged from $25.00 to $28.00 per hour. Tr. 120.

Section 8(f) Relief

Employer in this matter petitioned for relief under Section 8(f) of the Act, and the District Director denied the petition on March 4, 2005, on grounds that no evidence pre-dating the July 12, 2002 injury was submitted to establish constructive knowledge of the pre-existing permanent partial disability, and

further, while Dr. Hudson's report suggested that Claimant's current condition is not solely due to the July 12, 2002 injury, he failed to explain his rationale in light of Claimant's return to work after the prior injuries with no continuing treatment plan and the same impairment rating to the body as a whole as he has now. Cx 19.

The record shows that Claimant had two prior work-related injuries. He sustained cervical injuries at work in an auto accident on June 18, 1999, Ex 7A, and reported a January 7, 2000 work injury involving a container rod which caused back pain. Ex 2A; 4D. Dr. Hofmann, his treating physician at the time, sent him for an MRI on February 14, 2000. The MRI revealed a central disc protrusion at L4/L5 but no "significant mass effect on the thecal space." CX 2. On April 10, 2000, Dr. Hofmann reported that Chang had reached MMI with restrictions that allowed for medium work, but no repetitive climbing/bending but "occasional bending permitted," Ex 4C, and lifting up to 50 pounds. Ex 4G. Dr. Hofmann rated him at 10% permanent partial impairment to the person as a whole; 5% for his cervical injuries and 5% for his lumbosacral injury. EX 4G.

On January 11, 2005, Dr. Hudson reported that he had placed Chang at MMI on June 29, 2004, with a 10% permanent partial impairment of the body as a whole. The record shows that he restricted Claimant to bending no more than 5 times per hour and lifting no more than 35 pounds. Dr. Hudson noted that he had reviewed the February 14, 2000 MRI and Dr. Hofmann's impairment ratings for Claimant's prior cervical and lumbar conditions; and taking Claimant's history into consideration, Dr. Hudson opined that Claimant's current disability is not due solely to the July 12, 2002 incident at work, and he concluded that Claimant's disability is "materially and substantially greater" as a result of his pre-existing condition. Ex 13A.

Discussion

The Employer initially contends that Claimant was released to return to work with restrictions on March 1, 2004, and should have returned to work on the docks at that time. The record shows that Claimant initially tried to return to longshoring work but was advised by Local 1408 that, since he was placed on physical restrictions by his physician and was not 100% physically fit, he should not shape up. In a letter dated March 2, 2004, Local 1408 similarly advised Dr. Hudson of its position regarding Chang's inability to perform longshore work.

Nevertheless, Employer rejects Claimant's reason for not shaping up in March of 2004, and challenges Local 1408's assertions: arguing that the letter

issued to Chang is given to any worker with a permanent impairment who wants one; and those who do not request the letter routinely return to work without further interference from the Local. *See*, Tr. 173, 177. Employer believes that its allegation is clearly confirmed by Chang's eventual return to longshore work in August of 2004 with precisely the same restrictions he had when he was initially turned away by his Local in March, 2004. Tr. 173, 179.

To properly assess all of these assertions and counter-charges, four different time periods need be considered: first, the period from March 1, 2004 to May 26, 2004; second, the period from May 27, 2004 to June 23, 2004; third from June 24, 2004 to August 7, 2004, and finally from August 8, 2004, to date and continuing. Each period will be considered seriatim below.

March 1, 2004 to May 26, 2004
A Period of Temporary Total Disability

The record shows that virtually the entire period from the date of the accident through, at least, the end of February, 2004, Claimant was unable to return to work, and the parties did not dispute Claimant's condition during this period at the hearing. Complications materialized, however, when Dr. Hudson released Chang to return to the docks as an auto driver or flagman as of March 1, 2004, provided he limited his bending to no more than five times per hour and his lifting to no more than 35 pounds. When Chang attempted to return to the docks, he was advised by Local 1408 that no light duty work was available and he could not work as a longshoremen unless he was 100% physically fit. Relying on his Local's advice, Chang left the docks, and the Employer questions Chang's decision. Characterizing Local 1408's representations as disingenuous and inaccurate, Employer alleges that Claimant, in fact, could have returned to work on the docks had he simply gone back and shaped up.

For the time period under consideration here, however, the Local's policy regarding workers on restriction is not germane. The record shows that a few weeks before March 1, 2004, Claimant experienced an incident at home lifting firewood that temporarily triggered a flare-up of his back pain. On March 3, 2004, he returned to Dr. Hudson who then placed him again in a "no work" status pending resolution of the flare-up. In Dr. Hudson's opinion, and there is no medical evidence in the record to refute it, Claimant's flare-up was attributable to his job-related disc problem. Thereafter, on May 26, 2004, Dr. Hudson, released Claimant to return to work with the same restrictions he had previously imposed, but part-time, 4 hours per day for two weeks, then six hours per day for the next

two weeks, and thereafter, beginning June 23, 2004, full time with restrictions. We turn, first then, to Claimant's status prior to June 23, 2004.

Lifting Firewood: Natural Progression or Intervening Accident

The threshold issue in these circumstances is whether the flare-up of back pain triggered when Claimant lifted firewood at home is a natural progression of the work-related injury or an unrelated event. Employer argued at the hearing and again in its post-hearing brief that the incident lifting firewood was an intervening accident at home for which the Employer may not be held accountable. Employer argued further that Claimant, in lifting the firewood, may have exceeded the lifting and bending restrictions Dr. Hudson imposed, and, thereby, relieved the Employer of responsibility for the disability that resulted.[1]

Injury at Home

Initially, it should be noted that question of whether the firewood incident occurred at home or on the job is essentially irrelevant to a determination of whether it is a natural progression or intervening accident. For example, in Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954) a second leg injury at home due to leg instability was found to result from the first work-related leg injury. Similarly in Pakech v. Atlantic & Gulf Stevedores, 12 BRBS 47 (1980) a claimant's back gave way both at home while rising from a chair and subsequently while he was on the job with another employer. The Board concluded that the condition was the result of a natural progression of the first work injury. Similarly, in Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991), an employee injured his low back on July 30, 1985, and was paid benefits while he was unable to work. He returned to work for approximately fourteen months and was then laid off on February 26, 1987. Six weeks later, while at home, he experienced back pain doing yard work. The employer paid additional benefits for five weeks then terminated benefits, contending that the employee's yard-work incident was an intervening, non-compensable injury.

[1] At his deposition, Dr. Hudson testified the he relied on information provided by Claimant's counsel in concluding that Claimant was careful to stay within his limitation, Tr. 20; *See*, Hudson Dep. at 32-33. Employer moved to strike that deposition testimony because it relied upon counsel's representations not Claimant's testimony. Tr. 77-78. Since Dr. Hudson did rely upon counsel's representations in his deposition testimony at pages 20 and 32-33 related to the incident lifting firewood, Employer's motion to strike that testimony on those pages is granted. Dr. Hudson's deposition testimony at pages 44-45, however, was predicated on the testimony of Claimant at the hearing, and to the extent Employer's motion covers this portion of Dr. Hudson's deposition, it is denied.

The Board rejected the employer's contention in Merrill and held that the Section 20(a) presumption was invoked. The Board affirmed the conclusion that the claimant did not sustain a new injury in 1987 and that his lumbar condition (i.e., recurring chronic pain), was the natural and unavoidable consequence of his 1985 injury, was causally related to his employment, and thus, was compensable. Merrill, 25 BRBS at 144-45. *See also*, Kelaita v. Director, 799 F.2d 1308 (9th Cir. 1986); Delaware River Stevedores, Inc., v. Director, (3rd Cir. Jan. 30, 2002). *See generally*, Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, (2d Cir. 1989).

Here, like the Claimant in Merrill, Chang experienced ongoing waxing and waning pain symptoms virtually continuously after the accident as reflected in the treatment notes of Drs. Bahri, Hudson, and Kramarich through the date of the firewood lifting incident. Under such circumstances, the Section 20(a) presumption is triggered.

Employer can, of course, rebut the presumption when a subsequent non-work-related event has occurred by producing substantial evidence that the claimant's condition was not caused by the work-related event. *See* James, 22 BRBS 271. The Board has held, however, that lay evidence is not sufficient to establish an aggravation. *see,* Zea v. West State, Inc., (BRB No. 97-931) (Apr. 9, 1998)(unpublished). It is, therefore, significant that, in this instance, no physician has affirmatively concluded that when Claimant lifted the firewood at home he sustained an intervening injury unrelated to the disc problem caused by the injury at work; and as the case law demonstrates, the presumption is not rebutted merely by evidence showing that the flare-up of symptoms was triggered by an event the occurred at home.

Exceeding a Physician's Restrictions

Nor is it rebutted by the suggestion that Claimant may have exceeded Dr. Hudson's restrictions when he lifted the firewood at home. As a practical matter, it must be noted that injured workers often exceed the physical restrictions imposed by their physicians as the inevitable consequence of living a daily routine; and the Board's decisions reflect this. Indeed, the Board has declined to adopt the notion Employer here advocates that any non-work-related activity which exceeds a claimant's physical restrictions, per se, constitutes a non-compensable intervening event. To the contrary, a claimant like Chang who must adhere to a 35 pound lifting restriction need not carry around a scale to weigh every item he may pick up

during the course of a day. Nor must a worker who is limited to bending no more than 5 times per hour, necessarily count each bending motion in 60-minute segments during the course of a day. Rather, the test is negligence and standard is reasonableness.

Under applicable case law, an injury which results when a claimant's activity exceeds the limitations a physician has imposed is not, perforce, an intervening event. To the contrary, it may or may not be deemed a separate event rather than a natural consequence, depending upon whether the employee's conduct is intentional or negligent. Bludworth Shipyard v. Lira, 700 F.2d 1046, (5th Cir. 1983); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954); Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979); *see also*, Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986). Thus, the Board has held that a subsequent disability may or may not be compensable depending upon whether a claimant shows "a degree of due care in regard to his injury." Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979). In Grumbley, benefits were denied for a second leg injury at home because the claimant who had sustained a work-related leg injury failed to take reasonable precautions to guard against re-injury when he injury fell off his roof at home while repairing an antenna. As Grumbley suggests, the focus of the inquiry in cases of this type is whether the claimant took reasonable precautions in his injured or weakened condition to guard against re-injury. Marsala v. Triple A South, 14 BRBS 39, 43 (1981).

In this instance, Claimant testified that he experienced back pain lifting firewood at home. He testified that he lifted single pieces of wood several times, but the number of pieces he lifted during any 60-minute period is not reflected in the record. Consequently, the record does not show that Claimant exceeded his bending limitations. Claimant testified further that he lifted one piece of wood at a time. There is no indication in the record that Claimant weighed any of the pieces, but he credibly described the piece as "small."

Under these circumstances, the record evidence is sparse, but the evidence that was adduced, indicates that Claimant took reasonable precautions considering his condition and restrictions. As noted above, due care does not require a claimant to actually weigh any item before lifting it. Reasonable estimation is sufficient to establish due care. Thus, Claimant's decision to lift one small log at a time reflects due care not to exceed his 35- pound lifting restriction. Further, while he lifted several logs, one at a time, there is no basis for concluding that he failed to take reasonable precautions to avoid exceeding his bending restrictions. The

record shows that in carrying out a fairly routine activity, such as lifting several items likely to weigh less than 35 pounds, one at a time, Claimant was mindful of his condition and reasonably attempted to comply with his restrictions. Under such circumstances, the flare-up triggered when Claimant lifted the firewood at home is not an intervening event which resulted from Claimant's intentional or negligent indifference to his condition.

Claimant's Flare-up is Compensable

Dr. Hudson placed Claimant on temporary total disability status on March 3, 2004, but noted that the incident lifting the firewood that triggered the flare-up pre-dated this visit by several weeks; and it actually pre-dated March 1, 2004, when Claimant was otherwise scheduled to return to work. Since Claimant did not fail to exercise due care when he lifted the firewood logs at home, and since Dr. Hudson reasoned that this period of temporary total disability was attributable to Claimant's work-related disc problem; I conclude that the temporary total disability caused by this incident was a natural progression of his work-related disc problem which extended from the date it occurred[2] through May 26, 2004.

Period from May 27, 2004, to June 23, 2004

The record shows that Dr. Hudson released Claimant to return to work, part-time, 4 hours per day, beginning on May 27, 2004, and extending for a two week period, after which he released Claimant to work 6 hours per day for the next two weeks, and beginning on June 23, 2004, he released Claimant to return to work full time. Throughout the period Claimant was released for part-time work, his permanent physical limitations and restrictions applied.

The record shows that Employer conducted labor market surveys attempting to demonstrate that several jobs were available during this period that were suitable for Chang considering his age, education, work experience and physical limitations. However, with the exception of the jobs as greeter and cashier at Wal-Mart, the record fails to show that any of the other jobs offered part-time opportunities. Further, the job of Wal-Mart cashier required occasional bending which could amount to 2.6 hours per day, and thus exceeded the bending limitation Dr. Hudson imposed. As such, the record indicates that only the Wal-Mart greeter

[2] To the extent it may be suggested that the period of temporary total disability actually began on March 3, 2004, when Dr. Hudson declared it, rather than March 1, 2004, it must be noted that Employer, as discussed in detail *infra,* failed to demonstrate any suitable alternate employment during this two day period. Consequently, Claimant must be deemed totally disabled in any event.

job was suitable; however, its availability has not been demonstrated. It appears that, although the Employer's vocational expert could not confirm Claimant's application for one of the Wal-Mart jobs, Claimant testified credibly that he did apply and was not hired.

Under these circumstances, I am unable to conclude that the Employer demonstrated the availability of suitable alternate part-time employment during the period May 27, 2004 through June 23, 2004. What constitutes suitable alternate employment varies from circuit to circuit, but none have accepted as sufficient the mere showing by the employer that one suitable part-time job existed in the relevant labor market. New Orleans Stevedores v. Turner 661 F.2d 1031 (5th Cir. Nov. 1981). P&M Crane Company v. Hayes 930 F.2d 424 (5th Cir. 1991); Rogers Terminal and Shipping v. Director, 784 F.2d 687 (5th Cir. 1986); New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); Lentz v. Cottman Company, 852 F.2d 129 (4th Cir. 1988; Diaosdado v. John Bloodworth Marine, 29 BRBS 125 (9th Cir. 1996); Hairston v. Todd Shipyards Corp., 21 BRBS 122 (CRT) (9th Cir. 1988); Palombo v. Director, 937 F.2d 70 (2d Cir. (1991).[3] Further, it appears that Claimant did conduct a diligent job search and was unable secure a job consistent with his part-time restriction. He thus satisfied the requirement imposed by Palombo in seeking work during this period considering the temporary, part-time work restriction in addition to his permanent restrictions. For all of the foregoing reasons, I find and conclude that the Employer has failed to demonstrate the availability of suitable part-time work during the period from May 27, 2004, through June 23, 2004.

The Period from June 23, 2004, through August 7, 2004

Dr. Hudson released Claimant to return to work full time on June 23, 2004, with a 35 pound lifting restriction and a bending limit not to exceed 5 times per hour. On August 8, 2004, Claimant returned to the docks and resumed his longshore work. Employer argues that, notwithstanding the position of Local 1408 that only longshoreman who are 100% physically fit can shape up for jobs on the docks, Claimant returned to work with the same restrictions he had when the Local first turned him away in March of 2004; and this, according to Employer, demonstrates that, despite the Local's concerns, Claimant could have returned to longshore work as soon as his doctor released him for full time duty. As discussed

[3] This matter arises within the jurisdiction of the Eleventh Circuit Court of Appeals. In Universal Maritime Services Corp. v. Director, 137 Fed. Appx.210 (11th Cir. June 10, 2005), the Court, citing the Fifth Circuit's decision in Turner, *supra*, noted that the burden of proof shifts to the employer to establish suitable alternate employment, but the Court did not address the precise standard needed to satisfy that burden. *See*, Universal Maritime at 213.

above, regardless of the position taken by Local 1408 in March of 2004, Claimant was otherwise temporarily totally disabled by a job-related flare-up of his condition. The period commencing on June 23, 2004, through August 7, 2004, however, involves different, and more difficult, issues.

Union Requirements Govern the Shape Up

Beginning on June 23, 2004, the same types of jobs were available on the docks that Claimant eventually secured on August 8, 2004, by insisting that Local 1408 allow him to return to work. As previously discussed, Claimant had been advised in March, 2004, that only workers who were 100% physically fit could shape up, and he relied on that advice. Employer argues, however, that had he shaped up for work on June 23, he could have gone back to work and Local 1408 would not have blocked his return. Employer's arguments thus focused upon the principle issue addressed at the hearing concerning the availability, not the suitability, of jobs on the docks. Indeed, Claimant agreed at the hearing that his adjusted longshore wages constitute his post injury wage earning capacity.[4]

Here, then, is a period, from June 23, 2004, through August 7, 2004, in which Claimant, initially relying on Local 1408's objections to his shaping up for work, did not test the Local's resolve. Yet, he was not alone. The Employer, too, recognized Local 1408's right under the collective bargaining agreement to exercise control over the shape-up of workers and its right to restrict access to the docks to those it deems able-bodied. *See*, Ex 7 at 2-3. Indeed, the record shows that Employer paid benefits on that basis until Claimant actually challenged the shape up policy and returned to work on August 8, 2004.

Thus, the issue here is not whether Local 1408 has the legal power under the collective bargaining agreement to limit the availability of jobs on the docks to workers who are 100% physically fit. The issue is whether it actually enforces its authority to prevent disabled workers from shaping up, thus rendering the jobs

[4] Changing the theory of his case, Claimant argued in his post-hearing brief that he is only able to perform longshore jobs in pain with extraordinary effort. Aside from the prejudicial aspects that a post-hearing change in legal theory may generate; at the hearing, Claimant testified that he occasionally experiences discomfort on the job, but he did not testify that he can perform the jobs only with extraordinary effort. Indeed, Dr. Hudson has approved certain longshore jobs which are suitable, with modifications, which Claimant and his employers have apparently been able to accommodate. Moreover, Claimant testified that he has not been switched by his header from a position he shaped up for to a job that is unsuitable for him. Consequently, despite the new issue raised by Claimant in his post-hearing brief, the question post-hearing remains the same as the question litigated by parties at the hearing, and it focuses on the availability, not the suitability, of the longshore jobs Dr. Hudson approved and Claimant currently performs.

unavailable. Indeed, if the Local enforced the authority which Employer agrees is conferred upon it by the collective bargaining agreement, it would be difficult to contend that jobs on the docks were available to physically restricted workers the Local barred from shape up. Conversely, if the Local defers to the disabled worker who insists on shaping up for jobs the worker deems himself capable of performing or which have been approved by the longshoreman's physician, the Local's policy would not, alone, render work on the docks unavailable within the meaning of the Longshore Act.

Advisory Versus Not Mandatory Shape Up Policy

Under the circumstances demonstrated in this record, it appears that the jobs Claimant shaped up for on August 8, 2004, and thereafter, could potentially have been available to him when he was released for full time work on June 23, 2004. Indeed, while the record reflects Local 1408's policy regarding the shape up of able-bodied longshoremen, there is no basis on this record for concluding that Claimant actually would have been prevented him from shaping up for work in June, 2004, had he insisted, as he later did, on returning to work. To the contrary, Claimant's restrictions were precisely the same in August as they were in March, and although Local 1408's policy remained the same, Claimant, with the Local's knowledge, freely shaped up in August without incident. It thus appears that Local 1408's policy regarding the shape up of workers on restrictions, while authorized under the collective bargaining agreement, was apparently advisory, not mandatory.

The difficulty in this instance, however, is that neither Claimant nor the Employer knew, prior to August 8, 2004, that the shape up policy was advisory. Both, at the time, reasonably relied upon a mutual understanding that Claimant was not permitted to resume his longshore work with physical restrictions. As such, under these fairly unique circumstances, I am unable to conclude on this record that Claimant's failure to challenge his apparent exclusion from shape up before August 8, 2004, constitutes a failure diligently to pursue suitable alternate work.

To the contrary, the record shows that both the Employer and Claimant deem the Local's policy statement sufficient to exclude Claimant from longshore employment, and it further shows that view was shared by the OWCP. Apparently, no interested party thought Claimant could return to work on docks before Claimant succeeded in challenging the scope and application of the policy. Moreover, it does not appear that anyone insisted, prior to August 8, 2004, that Claimant undertake such a challenge. Consequently, despite Employer's current

protestations to the contrary, I find that Claimant diligently explored the policy of Local 1408 regarding the availability of longshore jobs to physically restricted workers, and I conclude that the availability of longshore work was not demonstrated on this record until Claimant succeeded in actually shaping up and returning to work on August 8, 2004.

Availability of Suitable Non-Longshore Jobs

The record shows that Rick Robinson performed labor market surveys and located several non-longshore jobs that Dr. Hudson approved. These included jobs at Healthcare, Inc., Harmony Dental Lab, Pilot Pen, cashier and greeter at Wal-Mart, Quest Diagnostic and each required bending "occasionally." Ex 13. However, Dr. Hudson later clarified that "occasional bending" exceeded his restrictions, and the record does not show that any of these non-longshore employers would accept or accommodate Claimant's five times per hour bending limitation. In addition, I have previously discussed the unavailability of the Wal-Mart jobs.

Consequently, suitable jobs which required bending "as needed" included Irwin Research, The Spaghetti House, Caruso Jeep, and Quick Test market surveyor which paid $6.00 per hour and was available on July 30, 2004. Ex 13. Robinson believes some of the jobs were probably available as of March 1, 2004, but he identified no specific job, except for the longshore jobs discussed above, that actually was available before July 30, 2004. Indeed, it appears that the Quick Test job, available eight days before Claimant returned to longshore work at $6.00 per hour, represents the earliest available position Employer identified on this record that met the bending restriction Dr. Hudson imposed. Ex 13 Technically, then, Claimant had a $6.00 per hour wage earning capacity for eight days before he returned to the docks.

Summary of Claimant's Disability
Wage Earning Capacity
And Overpayment

For all of the foregoing reasons, Claimant was temporarily and totally disabled during the contested period from March 1, 2004 through July 30, 2004, and, thereafter, from July 31, 2004, through August 7, 2004, he was permanently partially disabled with a wage earning capacity of $6.00 per hour, $48.00 for each of the five workdays during this period or $240.00 for the week. This wage earning capacity, however, must, as employer agreed at the hearing, be reduced by

the percentage increase in the yearly national average weekly wage pursuant to Quan v. Marine Power & Equipment Co., 30 BRBS 124 (1996) and Richardson v. General Dynamics, 23 BRBS 327 (1990) to its 2002 equivalent. As adjusted, Claimant's wage earning capacity during this period, therefore, amounts to $205.92. His average weekly wage is $1017.30. His loss of wage earning capacity for this one week period is, therefore, $811.38, and his compensation rate is $540.87 for this week. Employer paid him compensation in the amount of $678.13. Thus, it appears that the overpayment for this week amounts to $137.26.

Employer claims an overpayment of benefits amounting to $13,565.35 paid to Claimant from March 1, 2004, through August 1, 2004. The above overpayment, however, occurred in the first workweek in August, 2004, which began on Monday, August 2 and ended Friday, August 6, 2004. Accordingly, for the period March 1, 2004, through August 1, 2004, Employer has demonstrated no overpayment.

Overpayment
August 8, 2004 to date

As previously discussed, Claimant returned to longshore work on August 8, 2004. Employer contends that it mistakenly continued to pay him compensation, and claims an overpayment in the amount of $25,371.60 from August 1, 2004, to April 17, 2005. Claimant conceded that an overpayment did occur, but he disputes the amount of the overpayment and objects to the method Employer implemented to recover it. Tr. 38.[5]

The record shows that in calculating Chang's wage earning capacity, the carrier determined that he actually earned $35,172 during the nine month period after he returned to work, and it estimated that his annualized earnings amounted to $46,667. The Board has held, however, that only actual earnings may be used to determine wage earning capacity. It does not permit speculative estimates of anticipated earnings. *See*, Seidel v. General Dynamics Corp., 22 BRBS 403

[5] Again it must be noted that Claimant, in his post-hearing brief, suggested that he may be found totally disabled because he is only able to perform longshore work by expending extraordinary effort and enduring excruciating pain. *See*, Cl. Br. at 16. While the record, as previously discussed, does not support these contentions, *see* footnote 4 *supra*, Claimant's new argument represents a prejudicial change in theory which was not litigated upon proper notice at the hearing. Claimant agreed at the hearing that an overpayment did occur during this period and that his actual earnings constituted his post injury wage earning capacity. Tr. 109; *see also*, Tr. 36-37, 38. The issue litigated was whether a permanent partial disability resulted in loss of wage earning capacity. Tr. 39-40. The issue of permanent total disability was not raised at the hearing or adjudicated and will not further be considered here.

(1989); Johnson v. Newport News Shipbuilding and Dry Dock Co., 25 BRBs 340, (1992). Further, the carrier agreed that Claimant's post-injury wage earning capacity must be reduced to its 2002 equivalent, and as mentioned above, this is accomplished by taking Claimant's post-injury wage earning capacity and adjusting it by a percentage that reflects increases in the yearly national average weekly wage. Quan v. Marine Power & Equipment Co., 30 BRBS 124 (1996); Richardson v. General Dynamics, 23 BRBS 327 (1990).

Before making the adjustment, however, it must be mentioned that the parties, at the hearing, disagreed in respect to whether vacation and holiday pay and container royalties should be included in the wage earning capacity calculation and both agreed to brief the issue. Employer, however, eschewed any analysis of the issue in its brief, contending instead that "employer does not know the amount of the vacation and holiday pay or the container royalty" but it matters not because a comparison of Claimant's pre-injury wages with his post-injury ILA wages "shows that there is no loss of wage earning capacity."[6] Emp. Br. at 9. *See*, Seaco v. Richardson, 135 F.3d 1290 (11th Cir. 1998). Considering the evidence adduced in this record, I must conclude the Employer is mistaken.

As Employer contended, Claimant's actual earnings, which the parties agree are the appropriate measure of his post-injury wage earning capacity, during the 40-week period from August 8, 2004 through May 1, 2005, totaled $35,172.00.[7] Adjusted downward to its 2002 equivalent, as Employer agrees it must pursuant to Quan and Richardson, Claimant's wage earning capacity is $31,252.55 during the period for which data is available in this record.

Based upon his average weekly wage of $1,017.30, an equivalent period of 40-weeks earnings, pre-injury, totals $40,692.00, which includes his vacation and

[6] The record was held open post-hearing for receipt of Dr. Hudson's deposition and for Claimant's ILA wage and hour information through August of 2005. See. Tr. 188-193. In its post-hearing brief, Employer refers to an exhibit identified as EX 14 which allegedly shows August, 2004 to August 2005 earnings of $48,366.13, however, the record contains no Employer exhibit marked EX 14. *See*, Tr. 3 (Index), and only Dr. Hudson's deposition was submitted post-hearing.

[7] As noted above, the Employer was granted time but decided not to pursue vacation and holiday pay and container royalty data. Seaco v. Richardson, 136 F.3d 1290 (11th Cir. 1998) (container royalty payments and holiday/vacation payments do not represent post-injury wage-earning capacity under Section 8(h)); Randall v. Comfort Control, Inc., 725 F.2d 791, 796, 16 BRBS 56, 64 (CRT) (D.C. Cir. 1984); Eagle Marine Services v. Director, 115 F.3d 735, (9th Cir.1997) (holiday pay earned post-injury due to pre-injury work does not reasonably and fairly represent the claimant's wage-earning capacity); Sproull v. Director, 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), aff'g and modifying in part on recon. en banc, 28 BRBS 271 (1994) (Smith and Dolder, dissenting in part), aff'd in part rev'd in part, 86 F.3d 895, 899 (9th Cir. 1996), cert. denied, 520 U.S. 1155 (1997); Branch v. Ceres Corp., 29 BRBS 53 (1995), aff'd mem., 96 F.3d 1438 (Table),(4th Cir. 1996).

holiday pay (calculated in the year it is received rather than the year it is earned), and container royalty payments (compensation paid by shipping companies in lieu of work lost by longshoremen due to containerization). Sproull v. Stevedoring Servs. of America, 25 BRBS 100 (1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 136 (1990); Rayner v. Maritime Terminals, 22 BRBS 5 (1988); Waters v. Farmers Export Co., 14 BRBS 102 (1981), aff'd per curiam, 710 F.2d 836 (5th Cir. 1983) (vacation and holiday pay); Lopez v. Southern Stevedores, 23 BRBS 295 (1990) (container royalty). Consequently, Claimant's loss of wage earning capacity, adjusted back to 2002, amounts to $9,439.45 over a period of 40 weeks or $235.99 per week. His compensation rate is, therefore, $157.31 per week.

After he returned to work, Employer paid Claimant compensation in the amount of $25,371.60 for the period August 1, 2004 through April 17, 2005. During the first week of August, 2004 the overpayment, as noted above, amounted to $137.26. Thereafter, Claimant was paid $678.13 per week based on his average weekly wage of $1013.30, and the overpayment amounted to $520.82 per week. ($678.13-157.31) Accordingly, the total overpayment amounted to $19,407.60. (37 weeks at $520.82 and one week at $137.26).

Recovery of Overpayment

After discovering that it was mistakenly overpaying disability benefits following Claimant's return to work, Employer set about to correct its error by suspending all compensation payments. As a consequence, during the period April 18, 2005, through December 10, 2005, a period of 34 weeks during which Claimant was entitled to $157.31 per week, it appears that Employer recovered $5,348.54. The balance of the overpayment, therefore, amounts to $14,059.06.

Claimant complains, however, that Employer suspended his benefits and he demands that Employer be penalized for its unilateral action. Citing Phillips v. Maine Concrete Structures, 21 BRBS 233(1989); Flynn v. Clark & Sons, 30 BRBS 73 (1996), and Bell v. Crowley Maritime Corp., 2003 LHC 1643 (ALJ, 2004), he argues that Employer should be limited to recouping its overpayment at a rate of 20% of the amount of his bi-weekly payment or, in this case, $62.92 every two weeks, because it would impose a hardship on his family if it were recouped at a quicker pace. At the rate Claimant proposes, the balance of the overpayment would be fully recovered in 446.88 weeks or 8.59 years. Pursuant to a complete suspension of benefits, the overpayment would be liquidated in 89.37 weeks, or 1.72 years.

In response, Employer argues that it should be permitted to recover its overpayment by the quickest possible method because Claimant's contention that he accepted the overpayments in good faith thinking he was entitled to them lacks merit, and he should not be allowed to profit further. Claimant explains, however, that the checks were coded differently after he returned to work, and he thought he was entitled to receive them. Yet, the Employer's recovery of the overpayment is not predicated upon Claimant's state of mind in accepting the money; it is based on Section 14(j) of the Act.

Entitlement to Recovery of Overpayment

The case law amply supports the notion that an overpayment resulting from an erroneous payment of benefits may be recovered by the adversely affected employer under Section 14(j) of the Act. It is true, as Claimant contends that, unlike the situation here, Phillips and Flynn involved post-award situations, but the principle of recovery articulated by the Board is equally applicable here. The Board in Flynn reasoned that: "…the plain language of Section 14(j) does not require that a mistaken overpayment can be recouped only if it is voluntarily made prior to entry of an award. Rather the literal language of Section 14(j) merely requires that the payments of compensation be 'advance payments.' Within the context of Section 14 as a whole, the logical implication of this phrase is that in order for Section 14(j) to apply, a payment is considered to be in 'advance' if it is made prior to the date it is 'due' under Section 14(b)…" Flynn at 30 BRBS 75-76. Thus, the Board held that "an employer who is paying benefits pursuant to an award under the Act may credit excess payments it erroneously made…"[8] The Board's logic and reasoning are equally, if not more, compelling when applied to overpayments voluntarily, but mistakenly, paid. Accordingly, I conclude that the Employer is entitled to recover its overpayment in this proceeding.

Method of Recovery

[8] The Board' holding in Flynn emanated from the Fifth Circuit's decision in Phillips discussing the purpose of Section 14(j), and cited the Court's language that: "The purpose of Section 14(j) is apparent: If an employer has paid out, and the claimant has received, LHWCA benefits to which it is later found that the claimant is not entitled, the employer should be able to recover those funds." 30 BRBS at 75, citing Phillips v. Marine Concrete Structures, 877 F.2d 1231 at 1234, *rev'd on other grounds,* 895 F.2d . 1033 (5th Cir. 1990) (*en banc*).

The more challenging question presented by the facts here at issue involve the manner and means by which such recovery may be affected. In this instance, Employer endeavors to recoup its overpayment by suspending payment of all compensation benefits. Whether it had a right to act unilaterally in this way is the question at issue, and the authorities on this point seem mixed. Ordinarily, a party paying compensation without an award still must pay timely or suffer exposure to penalties under Section 14(e); and that is precisely what Claimant insists upon here. Yet, the case law, albeit mixed, suggests that Section 14(j) may provide an exception.

Claimant contends that to the extent any relief may be appropriate, it is incumbent upon the employer not to act unilaterally; and, in this instance, Employer's failure to follow proper procedure exposes it to the sanctions in Section 14(e). The Employer rejects this argument on equity grounds sounding in unjust enrichment, but it cites no authorities. The case law does, however, provide helpful guidance.

In Flynn, the Board permitted an employer unilaterally to recoup a $5,099.42 overpayment by suspending payments to a widow made pursuant to an order. In denying her request for, *inter alia,* reinstatement of benefits, the Board held that "employer is entitled to credit these payments against subsequent payments due until the overpayment is recouped." Flynn at 76. While Claimant seeks to distinguish Flynn, the self-help remedy the employer invoked clearly impacted the award in Flynn by effectively suspending it for 445 weeks. By implication, it appears Section 14(f) was deemed inapplicable under the circumstances in Flynn, and the Flynn rationale applies equally to Section 14(e).

Yet, there are indications in the case law which signal the Board's willingness to entertain alternative methods and means of accomplishing the recovery of overpaid sums which require no crafting of an exception to Section 14(e). Thus, in Phillips, the Board confirmed the employer's right to recover an overpayment, but rather than authorize a complete suspension of benefits during a fixed recovery period, the Board directed that the employer recover its overpayment in small increments which were paid to the employer by the Special Fund and deducted from the Claimant's Special Fund award. Phillips at 239, *affirmed,* 877 F.2d 1231.

While Phillips involved the Fund as the administrator of the method by which the overpayment was recouped, the notion that recovery may proceed

incrementally by deductions from compensation which are less than a complete suspension of benefits was not predicated on the Special Fund's involvement. That formula, it seems, was grounded on the fundamental humanitarian purposes of the Act which recognize both employer's right to recover an overpayment which would surely constitute an unjust windfall if not paid back, and the Claimant's reliance on compensation to make ends meet during periods of injury. Implicit in the Phillips approach is the recognition that a complete suspension of benefits, under such circumstances, may trigger extreme hardship.

As explained in Bell, *supra*, conceptually, the incremental approach the Board crafted in Phillips is not entirely compatible with the self help approach endorsed in Flynn; either an employer is entitled to recover an overpayment as quickly as possible under Section 14(j) regardless of the impact on the Claimant or it is not. Moreover, if the speediest means of recovering an overpayment is the remedy mandated by Section 14(j), then complete suspension of benefits would seem the correct approach. To be sure, no alternative recoups the overpayment faster.

If, in contrast, Section 14(j) contemplates any flexibility in the manner and means of recovering an overpayment, then Phillips seems to provide a more nuanced balance of the underlying humanitarian policies of the Act with employer's overpayment recovery rights. Under Phillips, the employee's compensation is reduced and he retains no windfall, but the employer recoups its money more slowly than a complete suspension of compensation would allow. Having considered the alternatives, and in the absence of a definitive ruling interpreting Section 14(j) as requiring the recovery of an overpayment by the quickest possible means, the methodology of recovery adopted in Phillips may reconcile the competing interests at stake in an overpayment situation with the Act's underlying principles; however, that is not to say that the policies fostered by Phillips are always at odds with a complete suspension of benefits as authorized by Flynn.

To be sure, both Phillips and Flynn contemplate the employer's complete recovery of the amount overpaid, but methods may vary depending upon the circumstances. In Bell, for example, it was determined that a full overpayment recovery from the children of a deceased longshoreman could be achieved incrementally by a reduction in benefits which factored in the ages of the children and the number of weeks they were likely to remain eligible to receive compensation; but Bell is distinguishable from the circumstances here.

The children in Bell had a fixed benefit amount and a finite period of entitlement. Claimant here argues that: "Given the nature of Mr. Chang's injuries it is impossible to determine the precise number of weeks that he will be entitled to PPD benefits." Cl. Br. at 23. Thus, not only are the number of weeks of entitlement indefinite in this instance, Claimant suggests that his condition may, in the future, require a change in his work status and a change in the amount of benefits. If his condition worsens, he may be unable to work at all. Yet, unlike the children in Bell who had no income to tide them over a period of a complete suspension of benefits, Claimant here is presently gainfully employed. Consequently, in Bell a slower method of recovery accommodated the Employer's right to a full recovery while avoiding a cut-off of benefits to the children who had no other demonstrated income.

Taking into consideration Claimant's concerns that his ability to continue working may be curtailed in the future, and balancing that concern with Employer's right to recover its overpayment, I conclude that the approach adopted by the Board in Flynn rather than Phillips is the appropriate method of recovery in this instance. The financial hardship Claimant will experience from a loss of compensation while he is working full time seems far less drastic than a 20% incremental reduction in benefits under circumstances in which Claimant, as he anticipates, may find himself unable to work in the future and his benefits may become the principle source of his income. Should that occur, it would seem to be in Claimant's interest to have the overpayment paid off and the debt behind him. At that point, he would have the use of his full compensation payment when he most needed it. Accordingly, pursuant to Phillips and Flynn, and consistent with Bell, I find and conclude that Employer, under these circumstances, may recover its overpayment by taking a credit in the full amount of each bi-weekly compensation payment until the overpayment is recovered. Should Claimant's work status change in the interim, he may, of course, apply for an incremental adjustment in the amount of the credit.

Penalties

Claimant also seeks penalties and interest in this matter because the Employer unilaterally suspended compensation payments previously paid without an award. Ordinarily, Section 14(e) would govern the outcome of that request. As discussed above, however, the Employer did not act without supporting authority. Indeed, considering the decision of the Board in Flynn, it would appear that Section 14(j) recovery situations may serve as an exception to the payment provisions in Section 14(e). Flynn, thus, seems to inoculate the Employer from the

more drastic sanctions Claimant seeks. As discussed above, the Board in Flynn seemed to carve out an exception to the post-award penalties provisions of Section 14(f) when an employer seeks to recover an overpayment, and, although Claimant suggests otherwise, its rationale seems equally applicable when compensation is paid without an award. Under these circumstances, Flynn, it would seem, renders penalties and interest inappropriate.

Section 8(f) Relief

Finally, Employer petitions for relief under Section 8(f) of the Act. The District Director denied the petition on March 4, 2005, on grounds that no evidence pre-dating the July 12, 2002 injury was submitted to establish constructive knowledge of the pre-existing permanent partial disability.[9] In addition, Dr. Hudson's report suggests that Claimant's current condition is not solely due to the July 12, 2002 injury; but, as the District Director observed, Dr. Hudson failed to explain how he reached his conclusion in light of the fact that Claimant returned to work after the prior injuries with no continuing treatment plan and he was then given the same impairment rating to the body as a whole as he has now. Cx 19.

The record shows that Claimant suffered two prior work-related injuries. He sustained cervical injuries at work in an auto accident on June 18, 1999, and reported a January 7, 2000 work injury placing a container rod. Experiencing low back pain, he visited Dr. Hofmann who sent him for an MRI on February 14, 2000. The MRI revealed a central disc protrusion at L4/L5 but no "significant mass effect on the thecal space." On April 10, 2000, Dr. Hofmann reported that Chang had reached MMI with restrictions that allowed for medium work, but no repetitive climbing/bending but "occasional bending permitted," and lifting up to 50 pounds. Dr. Hofmann rated him at 10% permanent partial impairment to the person as a whole; 5% for his cervical injuries and 5% for his lumbosacral injury.

On January 11, 2005, Dr. Hudson reported that he had placed Chang at MMI on June 29, 2004, with a 10% permanent partial impairment of the body as a whole. The record shows that he also restricted Claimant to bending no more than 5 times per hour and lifting no more than 35 pounds. Dr. Hudson noted that he had

[9] On December 2, 2005, the Solicitor of Labor, on behalf of the Director, moved to file a brief out of time addressing issues under Section 8(f). The Director elected not to participate at the hearing on July 12, 2005. Thereafter, the parties who did participate filed briefs on October 4, 2005, pursuant to a briefing schedule established at the hearing. The Employer, in fact, filed a separate brief on Section 8(f) on October 4, 2005. In view of the delay in requesting an opportunity to submit a brief, an expedited five-day briefing schedule was set for the Solicitor, and comments were received on December 16, 2005. Thereafter, Employer was invited to respond to the Director's, and did so on January 24, 2006.

reviewed the February 14, 2000 MRI and Dr. Hofmann's impairment ratings for Claimant's prior cervical and lumbar conditions; and taking this history into consideration, Dr. Hudson opined that Claimant's current disability is not due solely to the July 12, 2002 incident at work. He concluded that Claimant's disability is "materially and substantially greater" as a result of his pre-existing condition.

New Injury

As noted above, the Director denied Section 8(f) relief for two reasons: first, the evidence was insufficient to establish that the pre-existing permanent partial disability was apparent to the Employer, and second, Employer failed to establish that Claimant's current disability is not solely due to the new injury or that it is substantially and materially greater than would have resulted from the new injury alone. The Director did not dispute the fact that Claimant was the victim of a new injury at work on July 12, 2002, and reached maximum medical improvement with a permanent disability due to the new injury.

Pre-existing Disability

The record shows that Claimant suffered from a pre-existing permanent partial disability. Mikell v. Savannah Shipyard Co., 26 BRBS 32 (1997). He sustained cervical injuries at work in an auto accident on June 18, 1999, and reported a January 7, 2000 work injury placing a container rod which caused back pain. He was sent for an MRI on February 14, 2000, which confirmed a central disc protrusion at L4/L5. On April 10, 2000, Dr. Hofmann reported that Chang had reached MMI and rated him at 10% permanent partial impairment to the person as a whole; 5% for his cervical injuries and 5% for his lumbosacral injury.

Although Claimant was able to return to work, I conclude that this was a serious disability within the meaning of Director v. General Dynamics Corp., 982 F.2d 790 (2nd Cir. 1992), particularly in view of his documented permanent impairment rating and the work restrictions imposed by Dr. Hofmann that allowed for only medium work, but no repetitive climbing/bending but "occasional bending," and lifting up to 50 pounds. *See*, CNA Ins. Co. v. Legrow, 935 F.2d 1424 (1st Cir. 1991); Equitable Equipment Co. v. Hardy, 558 F.2d 1192 (5th Cir. 1977). These injuries constitute a pre-existing permanent partial disability. An economic loss need not be demonstrated. Director v. Campbell Industries, Inc. 678 F.2d 836 (9th Cir.) cert. denied 459 U.S. 1104 (1982); Hardy, *supra;* Bickham v. New Orleans Stevedoring Co. 18 BRBS 41 (1986).

Manifestation of Pre-Existing Condition

As noted above, the District Director questioned whether Claimant's pre-existing permanent partial disability was manifest to the Employer as required by the applicable case law. The courts have held, however, that as long as the pre-existing condition was documented before the second injury the employer need not have actual knowledge of the pre-existing condition. American Shipbuilding Co. v. Director, 865 F.2d 727 (6th Cir. 1989). Constructive knowledge of the condition is sufficient if the condition was objectively determinable from medical records in existence at the time of the second injury. Director v. Universal Terminal & Stevedoring, 575 F.2d 452 (3rd Cir. 1972). Dr. Hofmann's medical records and other reports documenting Claimant's injury history, the disability claims he filed, and the February 14, 2000 MRI report provide more than sufficient constructive notice of the pre-existing permanent partial disability to satisfy the manifestation requirement of Section 8(f).

Quantifying Disability

To prevail on a Section 8(f) petition, an employer must establish that a claimant's disability is not solely due to the new injury, Two "R" Drilling Co. v. Director, 894 F.2d 748 (5th Cir. 1990), and that it is substantially and materially greater than would have resulted from the new injury alone. Sproull v. Director, 86 F.3d 895 (9th Cir. 1996), cert denied 520 U.S.1155 (1997); Louis Dryfus Corp. v. Director, 125 F.3d 884 (5th Cir. 1997).[10] These were the elements of proof in Employer's defense which caused the District Director the greatest difficulty. Indeed, the District Director was mindful that Dr. Hudson reviewed Claimant's medical history and was aware of his prior disc condition. The District Director was also mindful not only that Dr. Hudson dismissed the July 12, 2002 injury as the sole cause of Claimant's current condition, but that he assessed Claimant's current disability as substantially and materially greater than it would have been based on the July 12, 2002 injury alone, and that he concluded that Claimant's condition is due to the combination of the pre-existing and second injury.

In its post-hearing brief, and again in its Response, Employer repeated the facts as discussed above, but it did not address the concerns the District Director articulated in his March 4, 2005 determination which focused on the need for

[10] The Director cites Jacksonville Shipyards v. Director, 851 F.2d 1314 (11th Cir. 1988) in support of his argument; however, Employer distinguishes this case on the ground that court determined that the claimant suffered a natural progression of a pre-existing injury, not a second injury.

further explanations to support Dr. Hudson's analysis. The District Director noted, for example, that Dr. Hudson failed to explain how he reached his conclusion in light of the fact that Claimant returned to work after the prior injuries with no continuing treatment plan. He noted further that Dr. Hofmann gave Claimant the same impairment rating to the body as a whole as Claimant has now. Indeed, Dr. Hofmann, assessing the prior injury, and Dr. Hudson, evaluating Claimant's current condition, both rated him with a10% whole body impairment. Yet, neither the Employer's brief or its Response addresses the District Director's concerns; and, more significantly, Dr. Hudson was not requested, at his deposition post-hearing, to address or respond to the District Director's initial concerns.

As a result, the evidence shows that Claimant's disability is related to both his pre-existing and current injury, but the courts have held that a mere nexus between the two injuries is insufficient to establish a defense under Section 8(f) in the absence of evidence which shows the degree of disability that would have resulted from the July 12, 2002 injury, assuming hypothetically that Claimant had no pre-existing disability. Louis Dreyfus Corp. v. Director, 125 F.3d 884, (5th Cir. 1997). Often referred to as the "quantification" test, an Employer must thus quantify the level of disability that would have resulted from the current work-related injury, alone, in order to demonstrate that the current condition is not due solely to the current injury. Director v. Newport News Shipbuilding and Dry Dock Co. (Harcum I), 8 F.3d 175, (4th Cir. 1993), *aff'd*, 514 U.S. 122, (1995). To be sure, Dr. Hudson concluded that the July 12, 2002 injury was "not the sole cause" of Claimant's disability; however, the courts have determined that such statements are insufficient unless employer also presents evidence of the type and extent of the disability that claimant would have suffered had he not been disabled at the time the second injury occurred. Director v. Ingalls Shipbuilding, Inc., 125 F.3d 303, (5th Cir. 1997).[11]

Lacking any separate measure of the July 12, 2002 injury alone, the District Director's reluctance to accept Dr. Hudson's conclusion that Claimant's disability

[11] The degree of certainty in quantifying the disability caused by the second injury alone may depend upon the whether the second injury involves the same body part as the pre-existing injury. For example, the assessment of the level of disability caused by a low back injury to a claimant who has a pre-existing permanent partial disability due to an arm injury involves a considerably different analysis from the Claimant who has a pre-existing permanent partial low back disability to his L4/L5 disc and subsequently sustains an injury to the same disc. Meeting the Harcum I test in the latter situation presents a formidable challenge. In the first example, the physician can evaluate the conditions as they actually exist and assess the impairments as they affect segregated and independent body parts, alone and in combination. In the latter example, in contrast, the physician must first evaluate a hypothetical situation that assumes the second injury occurred in a context devoid of the Claimant's actual medical history, and then quantify how badly a claimant's low back likely would have been disabled had it not been weakened or damaged by the pre-existing condition.

is materially and substantially greater is not without merit, particularly in light of Claimant's whole body impairment ratings. Thus, both Dr. Hofmann and Dr. Hudson rated Claimant's disability as 10% of the body as a whole. I am, however, mindful that Dr. Hofmann's 10% whole body rating represented a combination of a 5% cervical injury and a 5% lumbosacral injury, and that prior injury did not, unlike the second injury, produce pressure on the thecal sac. I note further that while the record shows that Dr. Hudson reported Claimant's cervical complaints, his primary focus was Claimant's L4/L5 disc and the surgery he performed to treat it. As a result, Dr. Hudson's evaluation may have focused on Claimant's low back condition, alone, as Employer argues in its Response, but the District Director, before this matter was referred for hearing, specifically noted that Dr. Hudson's rating was, at best, ambiguous; and Employer clearly had time to clarify the issue. Yet, it offered no evidence at the hearing, nor did it address the matter when it deposed Dr. Hudson, post-hearing, to clarify any difference between 10% whole body impairment rating he formulated and Dr. Hoffmann's 10% whole body impairment rating. Under these circumstances, I am unable to conclude, on this record, that Dr. Hudson's ambiguous rating satisfies the employer's burden.

The record, of course, contains evidence, other than the ambiguous impairment rating, which suggests that Claimant's current disability is not due solely to the new injury, and I have reviewed it. In addition to the opinion of Claimant's treating physician, the record shows that prior to the July 12, 2002 accident, Claimant's permanent physical restrictions imposed by Dr. Hofmann allowed for medium work, with no repetitive climbing or bending but "occasional bending permitted," and a restriction against lifting more than 50 pounds. The physical restrictions put in place by Dr. Hudson as a result of the July 12, 2002 accident were more stringent. Claimant's lifting allowance was reduced to 35 pounds, and his bending restriction was tightened from occasional bending to only 5 times per hour. As the vocational expert in this proceeding testified, "occasional" in this context would allow Claimant to bend up to about 2.6 hours in an 8-hour workday, and Dr. Hudson specifically disapproved that amount of bending for Claimant.

Nevertheless, The Board and the court's have deemed it impermissible to subtract Claimant's current restrictions from his prior restriction, because it still can not be ascertained on this record what Claimant's restrictions likely would have been based on his July 12, 2002 injury alone. *See*, Harcum I, *supra*. Under similar circumstances, the court observed: "[E]mployer did not satisfy the contribution element, as it did not provide quantitative evidence, other than the discredited 'subtraction' method of the disability ensuing from the work injury

alone so that it could be determined whether claimant's disability was materially and substantially greater as a result of the pre-existing disability." Newport News Shipbuilding & Dry Dock Co. v. Pounders, 326 F.3d 455, (4th Cir. 2003). Although Dr. Hudson concluded that Claimant's disability was materially and substantially greater, he was not asked to address the crucial hypothetical question which would have permitted "quantification" of the relative contribution of each injury. Consequently, the record does not show what portion of Claimant's current restrictions would be attributable to the July 12, 2002 injury alone and what portion is attributable to the combination of the pre-existing and current injury combined.

Similarly, a vocational rehabilitation specialist's report discussing wage rates available to claimant with and without the pre-existing disability may satisfy the quantification criterion, and, thus, may establish the contribution element of Section 8(f). Newport News Shipbuilding & Dry Dock Co. v. Director, [Harcum II], 131 F.3d 1079 (4th Cir. 1997). In this instance, the record shows that as a result of the increase in his bending and lifting restrictions, Claimant is no longer able to perform jobs requiring occasional bending. As a consequence, several jobs identified in the labor market surveys Robinson conducted that initially appeared suitable for Claimant had to be eliminated because their "occasional" bending requirements exceeded Claimant's 5 times per hour bending limitation. This represented an increase in Claimant's permanent physical restrictions over his pre-existing physical restrictions, and the elimination of numerous previously suitable jobs, thus demonstrating a hike in Claimant's disability.

Yet, the vocational expert did not address wage rates that likely would have been available to Claimant had he not had the pre-existing disability, and, as a result, we can not on this record determine how much of Claimant's lost wage earning capacity is attributable to his July 12, 2002 injury alone and how much is due to the combination of his pre-existing and second injury. Consequently, the record shows that Claimant has sustained a loss of wage earning capacity amounting to $235.99 per week, but Employer has not provided the evidence that would permit a reasonable quantification of the portion of this loss that is attributable to the July 12, 2002 injury alone; and as discussed above, it may not be determined, for Section 8(f) purposes, merely by subtracting the current wage earning capacity from Claimant's average weekly wage. Harcum I, *supra*; Pounder, *supra*; Director v. Newport News Shipbuilding & Dry Dock Co. 8 F.3d 175 (4th Cir. 1993) aff'd. 514 U.S. 122 (1995), 131 F.3d 1079 (4th Cir. 1997). *See also*, Marine Power & Equip. v. Dept. of Labor [Quan], 203 F.3d 664, (9th Cir. 2000).

Finally, Employer argues in its Response that the purpose of Section 8(f) is to alleviate potential employment discrimination against handicapped employees, and Claimant's pre-existing herniated disc is precisely the type of condition Section 8(f) was designed to address. Employer's articulation of the general policy underling Section 8(f) is both fair and accurate, but the evidence is insufficient to determine whether Claimant's pre-existing and second injury actually invoke that policy. The courts and the Board have imposed criteria which are prerequisites to triggering the defense; and for all of the reasons discussed above, I conclude that Employer has failed to demonstrate its entitlement to Section 8(f) relief. Accordingly;

ORDER

IT IS ORDERED that Employer pay to Claimant compensation for a temporary total disability of the back, based upon an average weekly wage of $1017.30 during the period March 1, 2004, through July 29, 2004; provided, however, that Employer is entitled to a credit for benefits paid during this period, and;

IT IS FURTHER ORDERED that Employer pay to Claimant compensation for permanent partial disability of the back, based upon a loss of wage earning capacity in the amount of $811.38 for the one week period of July 31, 2004, through August 7, 2004; and, thereafter, commencing August 8, 2004, and continuing, shall pay compensation for a permanent partial disability based upon a loss of wage earning capacity in the amount of $235.99 per week: provided, however, that Employer is entitled to a credit equal to the amount of each compensation payment due until the total overpayment in the amount of $19,407.60 is recovered, and;

IT IS FURTHER ORDERED that the Employer's Petition for Section 8(f) relief be, and it hereby is, denied.

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Stuart A. Levin
Administrative Law Judge